IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.2014 OF 2005

WITH

CRIMINAL APPEAL NO. OF 2005

M/s.Bismi Enterprises ...Applicants/Appellants

Versus

Air Marine Cargo & Forwarders

Pvt.Ltd. & Ors. ...Respondents

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Mr.A.P.Mundargi with Mr.Niranjan Mundargi &

Mr.A.S.Khan for Applicants/Appellants.

Ms.Rita Bhatia for Respondents 1 & 2.

Ms.M.M.Deshmukh, A.P.P. for Respondent No.3.

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CORAM: A.M.KHANWILKAR, J.

NOVEMBER 18, 2005.

P.C.

1. Heard Counsel for the parties.

2. Leave to appeal granted.

3. Rule. Ms.Bhatia waives notice for Respondents 1 and 2. Ms.Deshmukh, A.P.P. waives

notice for Respondent No.3.

4. As short question is involved, rule made returnable forthwith and Appeal is taken up for hearing forthwith by consent.

5. This appeal challenges the order passed by the Trial Court disposing the complaint for non-prosecution. The order as passed on 1st September 2004, which is impugned in this Appeal reads thus:

> "Complainant is not present. Evidence is started. Plea is recorded on 15th March 2004. Matter is adjourned for cross three times. Hence, the complaint is dismissed. Accused is acquitted.

6. The above reasons stated in the impugned order dated 1st September 2004 is clearly manifest error committed by the lower Court, as can be seen from the record. It is seen from the Roznama, certified copy whereof is placed on record that on 15th March 2004, both the parties were present with Advocates. Charge was explained to the accused and case was adjourned for evidence to 17th April 2004.

On 17th April 2004, however, the Board was discharged by the concerned Court. The matter was adjourned to 22nd June 2004. On 22nd June 2004, complainant and accused No.3 were present. The case was adjourned to 26th July 2004. Once again, on 26th July 2004, complainant was present with Advocate, but the case was adjourned to 1st September 2004.

7. There is nothing in the abovesaid Roznama for 15th March, 22nd June or 26th July 2004 to indicate that the complainant was at fault or was not cooperating with the trial. Viewed in this perspective, the order as passed on 1st September 2004 on account of absence of complainant, thereby rejecting the complaint, cannot be sustained.

8. To get over this position, Counsel for Respondents 1 & 2 contends that the explanation offered by the Appellants that they were under the impression that the case was adjourned to 17th March 2005 is unacceptable. It is not necessary to examine that aspect of the matter. Suffice it to observe that the Court below has rejected the

complaint solely on the consideration that matter was adjourned for cross three times and no effort was made by the complainant to proceed in the matter. That position is falsified from the Roznama for 15th March, 17th April, 22nd June or 26th July 2004. On none of these dates, the Court has recorded that the complainant failed to proceed with the cross-examination or was unwilling to do so. It would have been a different matter if that was the reason stated on the earlier dates so as to justify the order of dismissal of complaint on 1st September 2004. In other words, even if the Appellants have not offered sufficient explanation, in my opinion, as the Court below has proceeded on erroneous premiss to dismiss the complaint, that itself, is a good ground for the Appellants to succeed in this Appeal.

9. Counsel for Respondents 1 & 2 would then contend that in fact, the Appellants have abandoned the subject criminal complaint, inasmuch as one accused was discharged and further that the complainant has filed another complaint on 5th November 2004 founded on the same dishonoured

cheque. In my opinion, even this submission will have to be only stated to be rejected. The subsequent complaint filed is specific to criminal action under Section 420 read with 34 of the Indian Penal Code. Indeed, reference is made to the said dishonoured cheque, but that does not mean that the action under Section 138 of the Negotiable Instruments Act is extricated or the complainant will be denuded of his right to pursue the said complaint.

10. Accordingly, this appeal ought to succeed. The impugned order is set-aside and instead, the complaint is restored to the file, to be proceeded with, in accordance with law.

A.M.KHANWILKAR, J.